

## February, 2012 - Vermont Bar Examination

### MODEL ANSWER - QUESTION 1 - July 2011

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website [www.ncbex.org](http://www.ncbex.org) at a later date.

### MODEL ANSWER - QUESTION 2 – July 2011

PLEASE NOTE: QUESTION 2 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website [www.ncbex.org](http://www.ncbex.org) at a later date.

### MODEL ANSWER - QUESTION 3

#### Question 1

The flooring products were “movable at the time of identification to the contract for sale” and therefore the contract will be interpreted under Article II of the Uniform Commercial Code, as it has been codified in Vermont at 9A V.S.A. § 2-101, *et seq.* (the “UCC”). *See* UCC 2-102 (article applicable to transactions for sale of goods); UCC § 2-105 (definition of goods). AmSports’s email requesting delivery of the products, Florco’s subsequent delivery of and corresponding Invoice for those same products, which were accepted by AmSports, together provide sufficient detail as to the price and quantity of the goods ordered and will meet the requirements of the statute of frauds. *See* UCC 2-201 (requirements necessary to satisfy statute of frauds).

#### Question 2

Since both Florco and AmSport deal regularly in flooring products, they are considered “merchants” within the meaning of the UCC. *See* UCC 2-104 (merchants deal in goods of the kind or otherwise hold themselves out as having knowledge or skill peculiar to the goods involved). Whether the additional terms on the Invoice are part of the contract is determined under Section 2-207 of the UCC, which provides:

“The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of a contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”

*See* UCC 2-207(2).

Here, there is no language limiting Florco’s acceptance of the contract to the terms of the Invoice, nor did AmSport notify Florco of its objection to them. Thus, the analysis will turn on whether the additional terms materially alter the parties’ agreement. AmSport will likely argue that the Invoice terms do materially alter the agreement, and will assert that they are commercially unreasonable given standard industry practices. Florco likely has the stronger argument given the parties’ 20-year relationship, during which the Invoice terms were consistent without objection from AmSport. Under these facts there is no danger of unfair surprise to AmSport, and the court will likely find that the Invoice terms do not materially alter the contract, although the court may be receptive to arguments from AmSport that the 10% fee is an unenforceable penalty, not reasonably related to Florco’s actual damages.

### Question 3

Florco’s suit will likely be successful. The suit is properly brought in federal court in Vermont on the basis of diversity jurisdiction, since AmSport is a citizen of Vermont, and Florco is a citizen of California, and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332(a)(2). Although there is a forum selection clause on reverse of the Invoice, its application is limited to suits relating to the Limited Warranty, and, in any event, Florco likely waived this provision by commencing an action in Vermont, thus making AmSports’s compulsory counterclaim properly brought in federal court in Vermont.

Florco has a strong breach of contract claim. Florco delivered the goods to AmSport. The facts do not indicate that the goods in any way failed to conform to the contract at the time of delivery, and do not state that AmSport has returned any portion of the delivered goods within a reasonable time, and therefore, they have been accepted. *See* UCC 2-601 (buyer may reject portion of goods that do not conform to the contract); 2-602 (goods must be rejected within a reasonable time and buyer must seasonably notify seller).

According to the payment terms on the Invoice (see analysis above), payment was due, at the very latest, in early May 2010 (90 days from January 31, 2010), and thus AmSport is liable for the amount of the Invoice. *See* UCC 2-607(1) (buyer must pay at contract rate for any goods accepted); 2-709(a)(1) (when buyer fails to pay price when it becomes due, seller may recover price of goods accepted). Florco also has a claim for interest, penalties, and attorney’s fees under the language on the reverse of the Invoice. Again, as described above, the strength of this claim will turn on whether these provisions “materially alter” the parties’ agreement.

AmSports is not likely to prevail on its counterclaim. The Limited Warranty states that the exclusive remedy is replacement of the defective part. Since this is not a consumer transaction, a limited warranty is permissible if the limitation is in writing, and, as here, the exclusion of the implied warranties of merchantability and fitness for a particular purpose is made in conspicuous language. *See* UCC 2-316. A warranty limited to repair and replacement, and excluding consequential damages, is likewise permissible to the extent it does not fail of its essential

purpose. *See* UCC 2-719. Here, however, since AmSport replaced the materials itself, without giving Florco an opportunity to inspect the allegedly defective products, Florco has a strong argument that it is not liable to AmSport for the costs it incurred in removing and reinstalling Florco materials. AmSport would also have to show that the floors were subject to “normal use” and received “proper maintenance,” which it may be unable to do if the allegedly defective materials have been disposed of. Further, since the Limited Warranty does not provide for consequential damages, AmSport’s claims for lost income are also not covered.

Moreover, the Limited Warranty only guarantees that the products will be free from manufacturing defects for two years from date of sale. Although AmSport raised alleged defects in its response to Florco’s May 2010 letter before the expiration of two years, it arguably did not notify Florco properly of those claims, since the Limited Warranty states that claims must be made in writing to Florco by registered mail, return receipt requested, within 30 days of accrual. In addition, the Limited Warranty states that legal action to enforce its terms must be commenced within one year of accrual of the claim. The UCC provides that parties may agree to shorten the applicable statute of limitations from four years to not less than one year. *See* UCC 2-725. Thus, if AmSport’s counterclaim was commenced later than one year of accrual of its warranty claims, or if AmSport did not properly notify Florco within 30 days of accrual, Florco may avoid any liability to AmSport for the defective products.

#### **MODEL ANSWER - QUESTION 4**

1. In awarding parental rights and responsibilities and parent child contact the Court must follow the statutory factors set out at 15 V.S.A. Section 665. The factors include:

- (1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance;
- (2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment;
- (3) the ability and disposition of each parent to meet the child's present and future developmental needs;
- (4) the quality of the child's adjustment to the child's present housing, school and community and the potential effect of any change;
- (5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;
- (6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;
- (7) the relationship of the child with any other person who may significantly affect the child;

(8) the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided; and

(9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

(c) The court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent.

(d) The court may order a parent who is awarded responsibility for a certain matter involving a child's welfare to inform the other parent when a major change in that matter occurs.

Patricia should have sole parental rights, both physical and legal, and more than 50% of the parent child contact because she is more likely than Diane to foster a positive relationship between Diane and the children. While both parents have good relationships with the children, Diane is not acting in their best interest due to her hostility towards Patricia. While it is clear Diane loves the children and has been actively involved in caring for them up to the time of the separation, she is now putting her own feelings ahead of theirs in how she deals with Patricia. If the Court were to award sole parental rights to Diane it does not seem likely that she would be able or willing to foster the children's relationship with Patricia. By awarding sole parental rights to Patricia and parent child contact to Diane the Court will give the children their best chance of having a good relationship with both parents. The statute makes clear that the Court cannot order the parties to share parental rights absent an agreement.

The fact that Patricia was arrested for marijuana possession in 2011 is not likely to be a significant issue so long as this was an isolated incident. If there was evidence that Patricia had an ongoing serious problem with marijuana and that it was affecting her ability to care for the children, that could impact the Court's parental rights decision.

In reviewing the above factors it is clear that Diane has a strong case for significant parent child contact. She has a close relationship with the children and has been equally involved in their care. As the parties live near to each other, spending significant time with Diane will not cause any disruption in the children's school and community. While Diane has been struggling with the separation and this has resulted in hostility towards Patricia and some uncharacteristic acting-out, this is likely to resolve once the Court case is over and it will be in the children's best interest to resume and preserve their relationship with Diane.

2. Spousal maintenance is governed by 15 V.S.A. Section 752. In deciding whether an award is appropriate and, if so, in what amount, the Court must consider the following factors:

(a) In an action under this chapter, the court may order either spouse to make maintenance payments, either rehabilitative or permanent in nature, to the other spouse if it finds that the spouse seeking maintenance:

(1) lacks sufficient income, property, or both, including property apportioned in accordance with section 751 of this title, to provide for his or her reasonable needs; and

(2) is unable to support himself or herself through appropriate employment at the standard of living established during the civil marriage or is the custodian of a child of the parties.

(b) The maintenance order shall be in such amounts and for such periods of time as the court deems just, after considering all relevant factors including, but not limited to:

(1) the financial resources of the party seeking maintenance, the property apportioned to the party, the party's ability to meet his or her needs independently, and the extent to which a provision for support of a child living with the party contains a sum for that party as custodian;

(2) the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the civil marriage;

(4) the duration of the civil marriage;

(5) the age and the physical and emotional condition of each spouse;

(6) the ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the spouse seeking maintenance; and

(7) inflation with relation to the cost of living.

Property division is governed by 15 V.S.A. Section 751 and the Court must consider the following factors:

(a) Upon motion of either party to a proceeding under this chapter, the court shall settle the rights of the parties to their property, by including in its judgment provisions which equitably divide and assign the property. All property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property, whether in the names of the husband, the wife, both parties, or a nominee, shall be immaterial, except where equitable distribution can be made without disturbing separate property.

(b) In making a property settlement the court may consider all relevant factors, including but not limited to:

(1) the length of the civil marriage;

(2) the age and health of the parties;

(3) the occupation, source, and amount of income of each of the parties;

(4) vocational skills and employability;

(5) the contribution by one spouse to the education, training, or increased earning power of the other;

(6) the value of all property interests, liabilities, and needs of each party;

- (7) whether the property settlement is in lieu of or in addition to maintenance;
- (8) the opportunity of each for future acquisition of capital assets and income;
- (9) the desirability of awarding the family home or the right to live there for reasonable periods to the spouse having custody of the children;
- (10) the party through whom the property was acquired;
- (11) the contribution of each spouse in the acquisition, preservation, and depreciation or appreciation in value of the respective estates, including the nonmonetary contribution of a spouse as a homemaker; and
- (12) the respective merits of the parties.

As spousal maintenance and property division are connected (per 15 V.S.A. Section 751(b)(7) and Section 752(a)(1) and (b)(1), the Court must consider these awards together. Patricia and Diane had been married for seven years when they separated. We do not have information about their standard of living during the marriage or either party's age or health. The statute requires that the Court first determine whether either party is unable to meet her reasonable needs and is unable to support herself at the standard of living established during the marriage or is a custodian of the parties' child. It does not appear that either party meets this threshold standard. The Court will only go on to review the 7 factors if this threshold is met. It is extremely unlikely that Diane would receive an award of spousal maintenance as she earns more than Patricia. Patricia may receive an award if she cannot meet her reasonable needs on her income alone, particularly if she is granted primary physical responsibility for the children. However, any award is likely to be fairly short-term. Diane may argue for an award of spousal maintenance on the grounds that her higher earnings are likely to end in the next few years but it seems unlikely the Court would award her spousal maintenance under these circumstances.

Whether either party receives spousal maintenance will also depend upon how property is allocated. In Vermont, all property owned by either or both of the parties, however and whenever acquired, is subject to the jurisdiction of the court. The parties own their home jointly with Diane's mother. Patricia has already moved out so it seems likely Diane and her mother will either keep the duplex or sell it. If they keep it, Patricia will be entitled to some share of the equity. There is \$180,000 of equity in the home but Diane's mother owns a \$150,000 share leaving only \$30,000 in equity to divide between Diane and Patricia. If Diane plans to keep the home she will have to find a way to provide Patricia with a portion of the equity. If it did turn out that Diane was entitled to a period of spousal maintenance she could agree to take property in lieu of maintenance by keeping Patricia's share of the home equity.

The court will also have to decide how to allocate the credit card debt. In the absence of any extraordinary circumstances such as poor health, advanced age or extreme fault, the Court is likely to divide both property and debts more or less evenly.

3. If the Court ordered that Diane allow the children to speak with Patricia by phone on the weekends, Diane must allow this, even if the order was issued orally. In *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (2006), the Vermont Supreme Court

considered the enforceability of an oral order for parent child contact. The Court found no requirement that such an order be in writing beyond the writing created by the transcript of an oral order placed on the record. Patricia can move for contempt and enforcement based on the Court's oral order.

## **MODEL ANSWER - QUESTION 5**

(1) Is the WAC an “agency” for purposes of the Vermont Administrative Procedures Act (“APA”) Discuss.

The fact pattern states that the Vermont legislature intended for the WAC to have the power and authority to hold some type of hearings, but did not make clear whether it specifically envisioned the types of evidentiary hearings set forth in 3 V.S.A. 809.

Consequently, the two key points to address here are (a) whether the WAC is an “agency” so that the APA will provide the rules for hearings and other procedures; and (b) the key features of hearings in contested case proceedings under the APA. [It was also acceptable to discuss the latter point in the answer to question 2.]

An “agency” is defined in the APA as a “state board, commission, department, agency, or other entity or officer of state government, other than the legislature, the courts, the Commander in Chief and the Military Department, authorized by law to make rules or to determine contested cases.” 3 V.S.A. 301(b)(1). A “contested case” in turn refers to a “proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” 3 V.S.A. 801(b)(2). A “license” includes any agency permit, approval, registration, “or similar form of permission required by law.” 3 V.S.A. 801(b)(3).

Though no clear approach has emerged from the Vermont Supreme Court to determine when a governmental entity qualifies as an agency, the Supreme Court would likely follow the approach used in *Sprague v. University of Vermont*, 661 F.Supp. 1132 (D. Vt. 1987). There, the Court looked at a combination of legislative intent, agency characteristics, and past judicial interpretations to decide whether University of Vermont qualified as a state agency. Since there are not yet any judicial decisions concerning the WAC (according to the fact pattern), the focus should be primarily on legislative intent and agency characteristics.

The facts indicate that the WAC, on the whole, was intended to be an agency whose hearings would be governed by the APA. Key points include: (i) the recommendation of the WAC is required by law before the products can be offered for sale (i.e., this is a license); (ii) the legislature made reference to hearings and newspaper notice, suggesting an intent to include its hearings under the scope of the APA; (iii) the Commissioner of DWTS can overturn a decision only based on substantial evidence in a written record, and the only way to properly obtain such a record would be through an administrative hearing where documentary and testimonial evidence is presented and challenged; and (iv) the legislature appoints the members of the commission. On the other hand, (i) the WAC is not required to hold a hearing; (ii) the Commissioner of DWTS makes the final decision (and can basically overturn the WAC despite

the presumptive deference); and (iii) a “recommendation” is not necessarily a “similar form of permission” to a certificate, approval, permit, registration or charter (i.e., conforming to 3 V.S.A. 801’s definition of a “license.”) Extra points were awarded for pointing out that the default rule is to assume that most state governmental proceedings are governed by the APA in the absence of a specific exclusion. (E.g., 3 V.S.A. 816, containing whole classes of decisions by specific agencies that are not included under the APA).

The key elements of a contested case hearing are set forth in 3 V.S.A. 809, including (i) the specific contents of the notice (time and place, legal authority for hearing, statutes and rules at issue, short plain statement of matter at issue); (ii) opportunity to respond and present evidence and argument given to all parties (e.g., Down With Widgets); (iii) availability of settlement through stipulation, settlement, consent order or default; (iv) statement of what is included in records; (v) requirement of providing transcript; (v) authority of Board Chair / licensed attorneys to obtain records and compel witnesses.

(2) Assuming a WAC hearing is a contested case under the APA, explain the procedures available to the WAC to create the evidentiary record sought by Mann.

Under 3 V.S.A. 809(h), Len (as chair) has the power to issue subpoenas requiring “the attendance and testimony of witnesses and the production of books and records.” The APA is silent on the rules of discovery, but the rules of evidence generally apply at a contested case hearing. Agencies are required to give effect to the rules of privileges. 3 V.S.A. 810(1). Certain exceptions are made to the rules of evidence, including allowing for copies where original documents are unavailable, and allowing for normally inadmissible evidence to be admitted if they consist of facts “reasonably susceptible of proof,” and if “commonly relied upon by reasonably prudent men in the conduct of their affairs.” 3 V.S.A. 810(1).

The enforcement mechanism in the event that a person fails to appear or fails to produce the subpoenaed materials, or where a witness refuses to testify under oath or answer a question, is to commence an action in superior court in the county where the proceeding is taking place (usually Washington County). 3 V.S.A. 809a(a). The proceeding is held by the judge sitting alone, and is commenced by motion. 3 V.S.A. 809a(b). The respondent is not compelled to answer, but can respond to the initial motion in writing. In the event that the WAC, as the party issuing the subpoena, demonstrates that the subpoena was validly issued, the Court can award a fine of \$100.00 together with attorneys’ fees and costs, which includes costs of issuing new subpoenas and incurring additional expenses for expert witnesses. 3 V.S.A. 809a(e). The Court may hold a respondent who fails to comply with an order issued under 809a for contempt of court. 3 V.S.A. 809a(f).

(3) What issues arise under the Vermont Rules of Professional Conduct for Len? Discuss.

For Len, the key questions are (a) whether competing duties to the WAC and Suresafe create a conflict of interest; and, (b) whether serving on the WAC will put Len in the position of having to disclose information related to his representation of Suresafe.

Rule 1.7 of the Vermont Rules of Professional Conduct prohibits concurrent conflicts of interest. Rule 1.7(a) states that a concurrent conflict of interest exists when there is a significant risk that

the representation of a client will be materially limited by the lawyer's responsibilities to a third person, or by a personal interest of the lawyer.

Here, Len has a personal interest in serving as an impartial member of the WAC as it considers WeMake's request. The facts do not indicate whether Len's representation of Suresafe, Inc. will be impacted by the WAC's ruling on WeMake's request. However, Len must analyze whether there is a significant risk that his representation of Suresafe, Inc. will be materially limited by his role in the WAC's ruling on WeMake's request. If so, Len must then consider whether the resulting conflict is one that can be waived under Rule 1.7(b). If there is a conflict and it cannot be waived, Len must withdraw from representing Suresafe, Inc., or, recuse himself from consideration of WeMake's request.

Even if Len does not have an actual conflict of interest under Rule 1.7, he must not use information relating to his representation of Suresafe to Suresafe's disadvantage while considering WeMake's request to the WAC. V.R.Pr.C. 1.8(b).

In addition, Len has an ethical duty not to reveal information relating to his representation of Suresafe. V.R.Pr.C. 1.6(a). There are two exceptions to Rule 1.6's general prohibition of the disclosure of information related to the representation of a client.

The first exception mandates the disclosure of certain information related to the representation of a client. V.R.Pr.C. 1.6(b). Lawyers must disclose information to the extent reasonably necessary to prevent a client or someone else from committing a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or, to prevent the client from committing a crime or fraud that is reasonably certain to cause substantial injury to the financial interests of another. As written, the facts do not suggest that Len's role with the WAC gives rise to a mandatory duty to disclose information relating to his representation of Suresafe.

The second exception permits, but does not require, lawyers to disclose information relating to the representation of a client. V.R.Pr.C. 1.6(c). Under this exception, a lawyer may reveal information that is not required to be revealed, but that the lawyer reasonably believes is necessary to be disclosed in order to prevent the client or another person from committing a crime, or, to prevent the client or another person from committing an act that is likely to result in death or substantial bodily harm to the person committing the act. Again, the facts do not suggest that Len's service on the WAC gives him reason to believe that he is permitted to disclose information relating to his representation of Suresafe.

(4) What issues arise under the Vermont Rules of Professional Conduct for Mann? Discuss.

Several issues confront Mann.

An initial question is whether Mann's communication with colleagues at the Attorney General's office could be construed as an ex parte consultation under 3 V.S.A. 813. Under the statute, members of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate.

Whether there was an ex parte communication here may depend to some degree on timing. On the one hand, there is no per se prohibition on members of a commission speaking with colleagues about affairs that affect the state in the absence of commencement of a formal contested case proceeding. However, if the conversation took place between Mann and an Attorney General employee after the WAC received the request, the communication may be called into question, particularly considering that the Attorney General may be bringing a civil action and could decide to become a party to the regulatory proceeding as well. The fact that Mann is retired should have no bearing on the outcome; if anything, attorneys are held to a higher standard of observing rules concerning ex parte consultations.

The best remedy here would be to disclose the details of the communication first to the members of the WAC, and later to the parties prior to the hearing in order to provide an opportunity for a request for recusal.

In addition, despite having retired, Mann remains subject to the disciplinary jurisdiction of the Professional Responsibility Board due to the fact that he has an active law license and is admitted to practice law in Vermont. Administrative Order 9, Rule 5(A). Here, the State is Mann's former client and, as a former government lawyer, Mann must comply with Rule 1.11 of the Vermont Rules of Professional Conduct. The Rule indicates that a lawyer who has formerly served as a public officer or employee of the government is subject to Rule 1.9(c). As a result, while serving on WAC, Mann is prohibited (a) from using information relating to his representation of the State to the State's disadvantage, except as the rules would permit or require, or if the information has become generally known; V.R.P.C. 1.9(c)(1); and, (b) from revealing information relating to his representation of the State except as authorized by the rules. V.R.P.C. 1.9(c)(2). In short, while serving on the WAC, Mann must not use or reveal information acquired while representing the State to the State's disadvantage.

Mann also must be cautious about revealing confidential government information that he acquired while serving as an attorney in the consumer fraud division. Rule 1.11(c) of the Rules of Professional Conduct prohibits a lawyer who acquired confidential government information while working as a government attorney from representing a private client whose interests are adverse to the person about whom the lawyer has confidential government information in a matter in which the information could be used to the disadvantage of that person. Here, Mann is not representing a private client, so, arguably, Rule 1.11(c) does not apply. However, if Mann acquired confidential government information about WeMake while working in the consumer fraud division, there is an argument that Mann is prohibited from disclosing that information while serving on the WAC.

The fact that Mann's service on WAC may raise an appearance of impropriety is not relevant. The Rules prohibit actual conflicts and no longer reference appearances of impropriety.

(5) Briefly describe the APA procedure that may be available for the WAC to legally define "Vermont ethos," including additional information needed to know whether the procedure is available.

The course that ideally would be available to implement Nunn's suggestion is rulemaking, which is the procedure contained in the APA to generate "rules." Rules are "agency statements of

general applicability which implements, interprets, or prescribes law or policy which has been adopted” pursuant to the APA. 3 V.S.A. 801(9). However, the APA does not provide rulemaking authority in and of itself. Rather, the authority to allow an agency to engage in rulemaking must be rooted in the enactment legislation. Here, there is nothing to suggest that there is rulemaking authority sufficient to prescribe by rule what elements are necessary to satisfy the “Vermont ethos.”

With that said, the WAC would be in a position to submit to DWTS a written request to adopt or amend procedures a rules, assuming that DWTS may have sufficient rulemaking authority in its authorizing legislation. 3 V.S.A. 806. The responding agency would then have 30 days to initiate rulemaking, or deny the request, giving its reasons in writing.

Extra points were awarded for describing the rulemaking procedure in greater detail, or for pointing out whether the WAC could essentially begin outlining the meaning of the Vermont ethos as a “practice”, which could eventually be adopted as a rule. 3 V.S.A. 831(b).

13364178.1

## **MODEL ANSWER - QUESTION 6**

1. There was an enforceable contract formed between Peter and David. Peter forwarded a valid offer to David. A contract involving the sale of land must contain a specific description of the property and the sale price. Peter’s February 1 letter to David contained these necessary terms. This letter created an offer which could be accepted by David for a reasonable period of time. David’s acceptance of the offer on February 3 fell within a reasonable period of time.

David’s acceptance of the offer, on February 3, created a binding contract between Peter and David. David’s acceptance of the Offer was binding upon the mailing of his letter to Peter. The “Mailbox rule” provides that an acceptance is deemed effective upon depositing the acceptance into the mail, so long as the acceptance is properly addressed and stamped. As such an enforceable contract was created upon mailing of the February 3 letter.

Peter’s attempt to revoke the offer to sell was not effective. In order to revoke the offer, David would have needed to receive the revocation prior to his acceptance. This did not happen as Peter’s letter of revocation was mailed on February 4, subsequent to the acceptance by David.

2. No enforceable contract was entered into between Peter and Betty. The sale of the condominium involves the transfer of an interest in Real Property. The Statute of Frauds provides that such contracts must be in writing to be enforceable. 12 V.S.A. Section 181(5). The agreement between Peter and Betty was oral. As such, under the Statute of Frauds, no enforceable contract was formed.

Betty could attempt to argue, under a theory of part performance, that her deposit payment of \$1,000.00 removes the agreement from the Statute of Frauds and creates an enforceable contract. This argument would fail. Under a theory of part performance, Betty would claim that her reliance on the oral agreement and payment of the \$1,000.00 creates an enforceable contract.

Mere payment of a portion of the purchase price will not create an enforceable obligation based on the oral agreement. *Chomicky v. Buttolph*, 147 Vt. 128 (1986).

3. Betty can recover the \$1,000.00 deposit paid to Peter under a theory of promissory estoppel. Under this theory a promise is enforceable to the extent necessary to prevent injustice. Betty will need to establish that Peter's Action was reasonably expected to induce Betty to take action; the action was of a definite and substantial character and Betty in fact took action. The facts support the conclusion that Betty could be reasonably expected to pay the \$1,000.00 deposit. The payment was definite and substantial and Betty in fact made the payment. Based on this analysis, Betty should prevail on her claim for recovery under a theory of promissory estoppel.

4. Charlie can make a claim to the \$1,000.00 if he can establish that he was an intended beneficiary of the agreement between Betty and Peter. *Morrisville Lumber v. Okcuoglu*, 148 Vt. 180 (1987). His legal claims would fail because there was no enforceable agreement entered into between Betty and Peter. He cannot be a third party beneficiary of an unenforceable contract. Furthermore Charlie cannot establish that the parties intended for him to be a beneficiary of the contract between Betty and Peter. He does not have rights under the contract and he is not designated as receiving benefits under the contract. Under the facts, he is an incidental rather than intended beneficiary under the contract.

5. Betty could similarly bring a claim for unjust enrichment against David if the funds were mistakenly sent to him. Unjust enrichment rests on the principal that a person shall not be allowed to unfairly enjoy a gain at the expense of another. The inquiry is whether, in light of the totality of the circumstances it is against equity and good conscience to allow defendant to retain what is sought to be recovered. *Legault v Legault*, 142 Vt. 525, 531 (1983). Applying this standard to the facts of this case will result in a recovery for Betty. While David was not at fault in creating the unenforceable agreement, he has no legitimate basis for retaining the deposit monies. Betty, on the other hand, has unfairly lost the \$1,000.00. Under the totality of these circumstances David has been unjustly enriched.